



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

11 November 2021 *

(Reference for a preliminary ruling – Environment – Directive 2003/87/EC – Greenhouse gas emission allowance trading scheme – Article 2(1) – Scope – Article 3(e) – Concept of ‘installation’ – Effect on emissions and pollution – Ancillary units not generating as such greenhouse gas emissions – Article 10a – Transitional rules for free allocation of allowances – Data Collection Template – Corrected eligibility ratio – Method of calculation – Decision 2011/278/EU – Third subparagraph of Article 6(1) – Export of cooling to an entity that belongs to a sector exposed to a significant risk of carbon leakage)

In Case C-938/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany), made by decision of 16 December 2019, received at the Court on 24 December 2019, in the proceedings

Energieversorgungszentrum Dresden-Wilschdorf GmbH & Co. KG

v

Bundesrepublik Deutschland,

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, C. Lycourgos, President of the Fourth Chamber, and M. Ilešić, Judge,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Energieversorgungszentrum Dresden-Wilschdorf GmbH & Co. KG, by T. Heymann and C. Telschow, Rechtsanwälte,
- Bundesrepublik Deutschland, by I. Budde, J. Steegmann and A. Leskovar, acting as Agents,

* Language of the case: German.

– the German Government, by J. Möller and S. Eisenberg, acting as Agents,
– the European Commission, by G. Wils, B. De Meester and A.C. Becker, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 3 June 2021,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of (i) Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 140, p. 63), ('Directive 2003/87'), in particular Article 2(1) and Article 3(e) of that directive, (ii) the 'corrected eligibility ratio' referred to in the Data Collection Template available on the website of the European Commission, and (iii) Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council (OJ 2011 L 130, p. 1), in particular Article 6(1) thereof.
- 2 The request has been made in proceedings between Energieversorgungszentrum Dresden-Wilschdorf GmbH & Co. KG ('EDW') and Bundesrepublik Deutschland (Federal Republic of Germany) concerning an application for the free allocation of greenhouse gas emission allowances ('emission allowances') to an industrial, gas engine cogeneration plant that includes absorption chillers as ancillary units.

Legal context

EU law

Directive 2003/87

- 3 Recital 20 of Directive 2003/87 is worded as follows:

‘This Directive will encourage the use of more energy-efficient technologies, including combined heat and power technology, producing less emissions per unit of output, while the future directive of the European Parliament and of the Council on the promotion of cogeneration based on useful heat demand in the internal energy market will specifically promote combined heat and power technology.’
- 4 Article 2 of that directive, entitled ‘Scope’, provides, in paragraph 1 thereof:

‘This Directive shall apply to emissions from the activities listed in Annex I and greenhouse gases listed in Annex II.’

5 Article 3 of that directive, entitled ‘Definitions’, states:

‘For the purposes of this Directive the following definitions shall apply:

...

(b) “emissions” means the release of greenhouse gases into the atmosphere from sources in an installation or the release from an aircraft performing an aviation activity listed in Annex I of the gases specified in respect of that activity;

...

(e) “installation” means a stationary technical unit where one or more activities listed in Annex I are carried out and any other directly associated activities which have a technical connection with the activities carried out on that site and which could have an effect on emissions and pollution;

...

(u) “electricity generator” means an installation that, on or after 1 January 2005, has produced electricity for sale to third parties, and in which no activity listed in Annex I is carried out other than the “combustion of fuels”.

6 Article 8 of Directive 2003/87, entitled ‘Coordination with Directive 96/61/EC’, provides:

‘Member States shall take the necessary measures to ensure that, where installations carry out activities that are included in Annex I to [Council] Directive 96/61/EC [of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26)], the conditions of, and procedure for, the issue of a greenhouse gas emissions permit are coordinated with those for the permit provided for in that Directive. The requirements of Articles 5, 6 and 7 of this Directive may be integrated into the procedures provided for in [Directive 96/61].’

7 Under Article 10a of that directive, headed ‘Transitional Community-wide rules for harmonised free allocation’:

‘1. By 31 December 2010, the Commission shall adopt Community-wide and fully harmonised implementing measures for the allocation of the allowances ...

...

The measures referred to in the first subparagraph shall, to the extent feasible, determine Community-wide *ex ante* benchmarks so as to ensure that allocation takes place in a manner that provides incentives for reductions in greenhouse gas emissions and energy efficient techniques, by taking account of the most efficient techniques, substitutes, alternative production processes, high efficiency cogeneration, efficient energy recovery of waste gases, use of biomass and capture and storage of CO₂, where such facilities are available, and shall not provide incentives to increase emissions. ...

...

3. Subject to paragraphs 4 and 8, and notwithstanding Article 10c, no free allocation shall be given to electricity generators, to installations for the capture of CO₂, to pipelines for transport of CO₂ or to CO₂ storage sites.

4. Free allocation shall be given to district heating as well as to high efficiency cogeneration, as defined by Directive 2004/8/EC [of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC (OJ 2004 L 52, p. 50)], for economically justifiable demand, in respect of the production of heating or cooling. ...

...

11. Subject to Article 10b, the amount of allowances allocated free of charge under paragraphs 4 to 7 of this Article in 2013 shall be 80% of the quantity determined in accordance with the measures referred to in paragraph 1. Thereafter the free allocation shall decrease each year by equal amounts resulting in 30% free allocation in 2020, with a view to reaching no free allocation in 2027.

12. Subject to Article 10b, in 2013 and in each subsequent year up to 2020, installations in sectors or subsectors which are exposed to a significant risk of carbon leakage shall be allocated, pursuant to paragraph 1, allowances free of charge at 100% of the quantity determined in accordance with the measures referred to in paragraph 1.

...'

- 8 In accordance with Article 13(1) of that directive, the third trading period covers eight years, from 2013 to 2020 ('the third trading period').

Decision 2011/278

- 9 Article 3 of Decision 2011/278, entitled 'Definitions', is worded as follows:

'For the purposes of this Decision, the following definitions shall apply:

- (a) "incumbent installation" means any installation carrying out one or more activities listed in Annex I to Directive [2003/87] or an activity included in the Union scheme for the first time in accordance with Article 24 of that Directive which:
- (i) obtained a greenhouse gas emission permit before 30 June 2011; or
 - (ii) is in fact operating, obtained all relevant environmental permits, including a permit provided for in Directive 2008/1/EC [of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (OJ 2008 L 24, p. 8)] where applicable, by 30 June 2011 and fulfilled by 30 June 2011 all other criteria defined in the national legal order of the Member State concerned on the basis of which the installation would have been entitled to receive the greenhouse gas permit;

...

(c) “heat benchmark sub-installation” means inputs, outputs and corresponding emissions not covered by a product benchmark sub-installation relating to the production, the import from an installation or other entity covered by the Union scheme, or both, of measurable heat which is:

- consumed within the installation’s boundaries for the production of products, for the production of mechanical energy other than used for the production of electricity, for heating or cooling with the exception of the consumption for the production of electricity, or
- exported to an installation or other entity not covered by the Union scheme with the exception of the export for the production of electricity;

...’

10 Article 6 of that decision, entitled ‘Division into sub-installations’, provides, in paragraph 1 thereof:

‘For the purposes of this Decision, Member States shall divide each installation eligible for the free allocation of emission allowances under Article 10a of Directive [2003/87] into one or more of the following sub-installations, as required:

- (a) a product benchmark sub-installation;
- (b) a heat benchmark sub-installation;
- (c) a fuel benchmark sub-installation;
- (d) a process emissions sub-installation.

Sub-installations shall correspond, to the extent possible, to physical parts of the installation.

For heat benchmark sub-installations, fuel benchmark sub-installations and process emissions sub-installations, Member States shall clearly distinguish on the basis of NACE and Prodcom codes between whether or not the relevant process serves a sector or subsector deemed to be exposed to a significant risk of carbon leakage as determined by [Commission] Decision 2010/2/EU [of 24 December 2009 determining, pursuant to Directive 2003/87/EC of the European Parliament and of the Council, a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage (OJ 2010 L 1, p. 10)].

Where an installation included in the Union scheme has produced and exported measurable heat to an installation or other entity not included in the Union scheme, Member States shall consider that the relevant process of the heat benchmark sub-installation for this heat does not serve a sector or subsector deemed to be exposed to a significant risk of carbon leakage as determined by [Decision 2010/2] unless the competent authority is satisfied that the consumer of the measurable heat belongs to a sector or subsector deemed to be exposed to a significant risk of carbon leakage as determined by [Decision 2010/2].’

11 Article 7 of that decision, entitled ‘Baseline data collection’, states:

‘1. For each incumbent installation eligible for the free allocation of emission allowances under Article 10a of Directive [2003/87], including installations that are operated only occasionally, in particular, installations that are kept in reserve or on standby and installations operating on a seasonal schedule, Member States shall, for all years of the period from 1 January 2005 to 31 December 2008, or 1 January 2009 to 31 December 2010 where applicable, during which the installation has been operating, collect from the operator all relevant information and data regarding each parameter listed in Annex IV.

...

5. Member States shall obtain, record and document data in a manner that enables an appropriate use of it by the competent authority.

Member States may require the operator to use an electronic template or specify a file format for submission of the data. However, Member States shall accept an operator’s use of any electronic template or file format specification published by the Commission for the purpose of data collection under this Article, unless the Member State’s template or file format specification requires at least input of the same data.

...’

12 Article 9 of Decision 2011/278, entitled ‘Historical activity level’, provides, in paragraph 3 thereof:

‘The heat-related historical activity level shall refer to the median annual historical import from an installation covered by the Union scheme, production, or both, during the baseline period, of measurable heat consumed within the installation’s boundaries for the production of products, for the production of mechanical energy other than used for the production of electricity, for heating or cooling with the exception of the consumption for the production of electricity, or exported to installations or other entity not covered by the Union scheme with the exception of the export for the production of electricity expressed as terajoule per year.’

13 Under Article 10 of that decision, entitled ‘Allocation at installation level’:

‘1. Based on the data collected in accordance with Article 7, Member States shall, for each year, calculate the number of emission allowances allocated free of charge from 2013 onwards to each incumbent installation on their territory in accordance with paragraphs 2 to 8.

2. For the purpose of this calculation, Member States shall first determine the preliminary annual number of emission allowances allocated free of charge for each sub-installation separately as follows:

...

(b) for:

- (i) the heat benchmark sub-installation, the preliminary annual number of emission allowances allocated free of charge for a given year shall correspond to the value of the heat benchmark for measurable heat as referred to in Annex I multiplied by the heat-related historical activity level for the consumption of measurable heat;

...'

Decisions 2010/2 and 2014/746/EU

- 14 Point 1.4 of the Annex to Decision 2010/2 mentions, among the sectors exposed to a significant risk of carbon leakage, the manufacture of electronic components corresponding to code 3210 of the General Classification of Economic Activities in the European Community (NACE).
- 15 Point 1.1 of the Annex to Commission Decision 2014/746/EU of 27 October 2014 determining, pursuant to Directive 2003/87/EC of the European Parliament and of the Council, a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage, for the period 2015 to 2019 (OJ 2014 L 308, p. 114), which repealed Decision 2010/2, also mentions, among the sectors exposed to such a risk, the manufacture of electronic components, now corresponding to code 2611 of the NACE.

Delegated Regulation (EU) 2019/331

- 16 Commission Delegated Regulation (EU) 2019/331 of 19 December 2018 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council (OJ 2019 L 59, p. 8) contains an Annex VII, entitled 'Data monitoring methods'. Point 7 of that annex, entitled 'Rules for determining net measurable heat', includes a point 7.1, entitled 'Principles', which provides, in the fourth paragraph thereof:

'Where heat is used to provide cooling via an absorption cooling process, that cooling process shall be considered as the heat consuming process.'

Directive 96/61

- 17 Directive 96/61, which was repealed and replaced by Directive 2008/1, provided, in Article 2 thereof, entitled 'Definitions':

'For the purposes of this Directive:

...

2. "pollution" shall mean the direct or indirect introduction as a result of human activity, of substances, vibrations, heat or noise into the air, water or land which may be harmful to human health or the quality of the environment, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment;
3. "installation" shall mean a stationary technical unit where one or more activities listed in Annex I are carried out, and any other directly associated activities which have a technical connection with the activities carried out on that site and which could have an effect on emissions and pollution;

...

5. “emission” shall mean the direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into the air, water or land;

...’

Directive 2010/75/EU

18 It is apparent from recital 1 of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17) that that directive recast seven directives, including Directive 2008/1.

19 Article 3 of Directive 2010/75, entitled ‘Definitions’, states:

‘For the purposes of this Directive the following definitions shall apply:

...

(2) “pollution” means the direct or indirect introduction, as a result of human activity, of substances, vibrations, heat or noise into air, water or land which may be harmful to human health or the quality of the environment, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment;

(3) “installation” means a stationary technical unit within which one or more activities listed in Annex I or in Part 1 of Annex VII are carried out, and any other directly associated activities on the same site which have a technical connection with the activities listed in those Annexes and which could have an effect on emissions and pollution;

(4) “emission” means the direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into air, water or land;

...’

German law

20 Paragraph 4 of the Bundes-Immissionsschutzgesetz (Federal Law on emission control) of 15 March 1974 (BGBl. 1974 I, p. 721), in the version of 17 May 2013 (BGBl. 2013 I, p. 1274) (‘the BImSchG’), entitled ‘Permits’, provides in subparagraph 1:

‘The construction and the operation of installations which, on account of their inherent characteristics or their operation, are particularly capable of causing harmful effects for the environment, endangering, damaging significantly or specifically inconveniencing the local community or neighbourhood ... shall require a permit ...’

21 Paragraph 2 of the Treibhausgas-Emissionshandelsgesetz (Law on greenhouse gas emission allowance trading) of 21 July 2011 (BGBl. 2011 I, p. 1475; ‘the TEHG’), entitled ‘Scope’, provides:

‘(1) This Law shall apply to the greenhouse gas emissions referred to in Part 2 of Annex 1, which result from the activities referred to therein. This Law shall also apply to the installations referred

to in Part 2 of Annex 1 where they constitute parts of, or ancillary facilities of, an installation not referred to in Part 2 of Annex 1.

(2) For the installations referred to in points 2 to 31 of Part 2 of Annex 1, the scope of this Law shall extend to all

1. parts of the installation and process stages necessary for operation; and

2. ancillary facilities with a physical and operational connection with the parts of the installation and process stages referred to in point 1 and which could contribute to the generation of the greenhouse gases referred to in Part 2 of Annex 1.

The first sentence shall apply *mutatis mutandis* to the combustion units referred to in point 1 of Part 2 of Annex 1.

...

(4) Where installations referred to in points 2 to 30 of Part 2 of Annex 1 require a permit pursuant to the third sentence of Paragraph 4(1) of the BImSchG, the specifications contained in the permit for the installation granted in accordance with the BImSchG shall be decisive as regards the boundaries of the installations referred to in subparagraphs 2 and 3. The first sentence shall apply *mutatis mutandis* to the combustion units referred to in point 1 of Part 2 of Annex 1. In the situations referred to in the second sentence of subparagraph 1, the first sentence as regards the specifications contained in the permit granted pursuant to the BImSchG shall apply *mutatis mutandis* to parts of the installation or ancillary facilities.'

22 Paragraph 4 of the TEHG, entitled 'Emissions permit', states:

'(1) The operator of the installation must hold a permit for the greenhouse gas emissions generated by an activity referred to in points 1 to 32 of Part 2 of Annex 1. The permit must be granted by the competent authority on application by the operator of the installation, where that authority is able to verify the particulars referred to in subparagraph 3 on the basis of the documents provided together with the application.

...

(4) For installations granted a permit before 1 January 2013 in accordance with the provisions of the BImSchG, the permit pursuant to the law on emission control shall be the permit under subparagraph 1. However, in the situation referred to in the first sentence, the operator of the installation may also apply for a separate permit under subparagraph 1. In that case, the first sentence shall apply only until the separate permit is granted.'

23 Paragraph 9 of the TEHG, entitled 'Allocation of free emission allowances to operators of installations', provides in subparagraph 2:

'The allocation of free emission allowances shall be subject to the submission of an application to the competent authority. ...'

- 24 Paragraph 34 of the TEHG, in the version of 18 January 2019 (BGBl. 2019 I, p. 37), entitled ‘Temporary provision for operators of installations’, provides in subparagraph 1:

‘In respect of the release of greenhouse gases through activities within the meaning of Annex 1, Paragraphs 1 to 36 in the version applicable until the end of 24 January 2019 are still to be applied in relation to the 2013 to 2020 trading period.’

- 25 Paragraph 2 of the Verordnung über die Zuteilung von Treibhausgas-Emissionsberechtigungen in der Handelsperiode 2013 bis 2020 (Regulation on the allocation of greenhouse gas emission allowances for the 2013 to 2020 trading period) of 26 September 2011 (BGBl. I 2011, p. 1921), entitled ‘Definitions’, provides, in number 30 thereof, entitled ‘Allocation element with heat benchmark’:

‘Combination of inputs, outputs and related emissions that are not covered by an allocation element within the meaning of number 28 and are linked to the production of measurable heat or the import thereof from an installation coming within the scope of [the TEHG], in so far as the heat has been neither generated from electricity nor created in the production of nitric acid nor consumed to produce electricity nor exported with a view to producing electricity, and in so far as that heat

(a) is consumed in the installation, outside of an allocation element within the meaning of number 28, for the purpose of manufacturing products, producing mechanical energy or for heating or cooling, or

(b) is supplied to installations and other units which fall outside the scope of [the TEHG].’

- 26 Paragraph 3 of the Regulation on the allocation of greenhouse gas emission allowances for the 2013 to 2020 trading period, entitled ‘Formation of allocation elements’, states:

‘...

(2) For the purpose of determining the allocation element referred to in point 2 of subparagraph 1, the supply of measurable heat to a heat distribution network shall constitute supply to another unit within the meaning of Paragraph 2(30)(b). ...

(3) As regards the allocation elements referred to in points 2 to 4 of subparagraph 1, the applicant must form separate allocation elements for the product manufacturing processes that concern sectors exposed to a risk of leakage and for the other processes. ...

(4) As regards allocation elements with a heat benchmark, the following shall apply as regards attribution to the separate allocation elements for the purposes of subparagraph 3:

1. In the case of direct supply of heat to a customer who does not come within the scope of the TEHG, that heat must be attributed to sectors exposed to a risk of leakage in so far as the operator proves that the customer belongs to a sector exposed to a risk of leakage; as regards the remainder, that heat must be attributed to sectors not exposed to a risk of leakage;

2. In the case of supply of heat to heat distribution networks, the share of the total heat supplied which must be attributed to sectors exposed to a risk of leakage is that corresponding to the ratio of the heat supplied by the heat network operator to customers from sectors exposed to a risk of

leakage to the total heat supplied by that operator during the relevant period under Paragraph 8(1); as regards the remainder, that heat must be attributed to sectors not exposed to a risk of leakage.

...

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 27 EDW, the applicant in the main proceedings, operates a high-performance industrial, gas engine cogeneration plant which is subject to the greenhouse gas emission allowance trading scheme at EU level ('the ETS'). That cogeneration plant includes, as ancillary units, chillers, in particular absorption chillers ('the chillers'), which convert heat into cooling. Those chillers do not emit greenhouse gases.
- 28 That cogeneration plant supplies only Global Foundries' semiconductors manufacturing factory, which does not belong to EDW. The activity of Global Foundries, which is not subject to the ETS, belongs to a sector exposed to a significant risk of carbon leakage, pursuant to Decisions 2010/2 and 2014/746.
- 29 In particular, the cogeneration plant produces 80 °C hot water and steam. From the boiler, that 80 °C hot water is, on the one hand, supplied directly to Global Foundries and, on the other, provided, together with steam, to the chillers of the cogeneration plant. Those chillers supply Global Foundries with cooling, in the form of 5 °C or 11 °C water, for the purpose of manufacturing semiconductors. 32 °C warm water is also produced from the heat released by the chillers as well as by using the heat which, in the form of 11 °C or 17 °C water, returns from Global Foundries' cooling circuit to those chillers.
- 30 For the purposes of the grant of the permit required by the BImSchG, the cogeneration plant and its ancillary units are regarded as forming one and the same installation on account of the noise emissions from their operation.
- 31 On 19 January 2012, EDW filed an application for the free allocation of emission allowances with the Deutsche Emissionshandelsstelle (German Emissions Trading Authority; 'the DEHSt'), which granted it, under the provisions relating to a heat benchmark sub-installation, 63 770 free emission allowances by decision of 17 February 2014 and, following an objection, 14 497 additional allowances by decision of 28 April 2017.
- 32 In particular, in the allocation decision and in the decision on the objection, the DEHSt took the view that the absorption chillers formed part of EDW's installation subject to the ETS. It also refused to find that the cooling supplied by the chillers to Global Foundries is covered by the rules applicable to sectors or subsectors deemed to be exposed to a significant risk of carbon leakage. In addition, the DEHSt refused to recognise any allowance entitlement as regards the heat flow from the 32 °C warm water, in so far as the heat results from energy released by the operation of the chillers. It also deducted from the amounts of heat claimed by EDW the heat imported from the installation not subject to the ETS.
- 33 By its action brought on 1 June 2017 before the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany), EDW maintained its application for the free allocation of 121 013 additional emission allowances.

- 34 The referring court takes the view that the resolution of the dispute brought before it turns, first of all, on the compatibility with Directive 2003/87 and, in particular, with Article 2(1) and Article 3(e) thereof, of national legislation which provides that, in order to determine the boundaries of installations subject to the ETS, account must be taken, as the case may be, of the specifications of those installations as set out in a permit granted under separate national rules relating to pollution, which might have the effect of including within the boundaries of those installations ancillary units, such as the chillers at issue in the main proceedings, which do not emit greenhouse gases. The referring court states that the question of whether those chillers come within or fall outside the boundaries of the installation subject to the ETS at issue in the main proceedings has an impact on the number of free emission allowances that are to be granted to EDW.
- 35 Next, the referring court expresses uncertainty, if the provision is compatible with that directive, as to how the number of free emission allowances allocated to heat benchmark sub-installations is to be determined. It is unsure, *inter alia*, as to how, in the light of heat imported from installations that are not subject to the ETS, the corrected eligibility ratio referred to in the Data Collection Template should be calculated and applied, and, in particular, whether it is necessary to adopt a comprehensive approach as regards the heat flows for the installation concerned or whether it is possible, in order to attribute that import of heat, to distinguish between those various flows.
- 36 Lastly, that court asks about the conditions governing implementation of the rules applicable to the sectors or subsectors deemed to be exposed to a significant risk of carbon leakage, pursuant to the third subparagraph of Article 6(1) of Decision 2011/278, as regards the cooling produced in EDW's chillers and supplied to Global Foundries.
- 37 In those circumstances, the Verwaltungsgericht Berlin (Administrative Court, Berlin) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Is Article 2(1) of [Directive 2003/87] to be interpreted as meaning that a provision such as that in the first sentence of Paragraph 2(4) of the [TEHG], pursuant to which an installation authorised under the [BImSchG] is also subject to [the ETS] to the extent that the authorisation also covers ancillary facilities that do not emit greenhouse gases, is compatible with that provision of the directive?
- (2) If the first question is answered in the affirmative:
- Does it follow from the rules for calculating the corrected eligibility ratio for heat imported from installations not subject to [the ETS], which are provided for in the [Data Collection Template] drawn up by the European Commission and are prescribed for Member States, that that ratio is applicable to the total amount of heat produced in the installation subject to [the ETS] even if the imported heat can be clearly attributed to one of several identifiable and separately recorded heat flows and/or heat consumptions inside the installation?
- (3) Is the third subparagraph of Article 6(1) of [Decision 2011/278] to be interpreted as meaning that the relevant process of the heat benchmark sub-installation for this heat serves a sector or subsector deemed to be exposed to a significant risk of carbon leakage as determined by [Decision 2010/2] where the heat is used to produce cooling and the cooling is consumed by an installation not subject to compulsory emissions trading in a sector or subsector which is exposed to a significant risk of carbon leakage?

Is it relevant for the applicability of the third subparagraph of Article 6(1) of [Decision 2011/278] whether the production of cooling takes place within the boundaries of the installation subject to [the ETS]?’

Procedure before the Court

- 38 The referring court has requested that the present case be determined pursuant to an expedited procedure under Article 105(1) of the Court’s Rules of Procedure.
- 39 In support of its request, it stated that, according to the case-law of the German courts, entitlement to free emission allowances would be lost in the absence of a decision allocating those rights before 30 April of the year following the expiry of the third trading period, on account of the absence of provisions allowing those rights to be carried forward to the fourth trading period. Therefore, in its view, provided that such an interpretation is consistent with EU law, EDW would, in the absence of a decision having the force of *res judicata* before 30 April 2021, be liable to lose the additional free emission allowances which it is claiming. Furthermore, the referring court points to the fact that that question arises in a fairly large number of cases pending before it.
- 40 It follows from Article 105(1) of the Rules of Procedure that, at the request of the referring court or tribunal or, exceptionally, of his or her own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, decide, after hearing the Judge-Rapporteur and the Advocate General, that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure derogating from the provisions of those rules.
- 41 On 22 January 2020, after hearing the Judge-Rapporteur and the Advocate General, the President of the Court decided to reject the referring court’s request that the present case be determined pursuant to an expedited procedure.
- 42 That decision was based on the fact that the reasons relied on by the referring court were not such as to demonstrate that the conditions laid down in Article 105(1) of the Rules of Procedure were satisfied in the present case (see, by analogy, judgment of 25 February 2021, *Gmina Wrocław (Transformation of the right of usufruct)*, C-604/19, EU:C:2021:132, paragraph 45 and the case-law cited).
- 43 It is apparent from the Court’s case-law that the mere interest of litigants in determining as quickly as possible the scope of their rights under EU law, while legitimate, is not such as to establish the existence of an exceptional circumstance for the purposes of Article 105(1) of the Rules of Procedure (order of the President of the Court of 18 January 2019, *VW (Right of access to a lawyer in the event of non-appearance)*, C-659/18, not published, EU:C:2019:45, paragraph 7 and the case-law cited).
- 44 In that regard, the fact that EDW brought the action on 1 June 2017, that is to say, more than two and a half years before the referring court decided to refer the present request for a preliminary ruling to the Court, accordingly puts into perspective the degree of urgency that characterises the dispute in the main proceedings (see, by analogy, order of the President of the Court of 18 January 2019, *Adusbef and Others*, C-686/18, not published, EU:C:2019:68, paragraph 15 and the case-law cited).

- 45 Furthermore, it is settled case-law that mere economic interests, however important and legitimate they may be, are not such as to justify, in themselves, use of the expedited procedure (see, to that effect, judgment of 25 February 2021, *Gmina Wrocław (Transformation of the right of usufruct)*, C-604/19, EU:C:2021:132, paragraph 46 and the case-law cited)
- 46 Moreover, it should be noted that the large number of persons or legal situations which may be affected by the decision that a referring court must give after making a request to the Court for a preliminary ruling does not, as such, constitute an exceptional circumstance justifying application of the expedited procedure (see, to that effect, judgment of 8 December 2020, *Staatsanwaltschaft Wien (Falsified transfer orders)*, C-584/19, EU:C:2020:1002, paragraph 36 and the case-law cited).

Consideration of the questions referred

The first question

- 47 By its first question, the referring court asks, in essence, whether Article 2(1) and Article 3(e) of Directive 2003/87 must be interpreted as precluding national legislation which permits the inclusion, within the boundaries of an installation subject to the ETS, of ancillary units which do not emit greenhouse gases.
- 48 In the present case, the national legislation at issue in the main proceedings provides that the boundaries of an installation, as regards the application of the ETS, are to be determined in accordance with the specifications set out in the permit granted to that installation under other national legislation relating to pollution. In that regard, the chillers at issue in the main proceedings, which do not emit greenhouse gases, have been included within the boundaries of the installation for the purposes of that permit on account of their noise emissions.
- 49 It should be recalled that Article 3(e) of that directive defines the concept of ‘installation’ as a stationary technical unit where one or more activities listed in Annex I are carried out and any other directly associated activities which have a technical connection with the activities carried out on that site and which could have an effect on emissions and pollution.
- 50 Consequently, since no activity listed in that Annex I is carried out therein, units such as the chillers at issue in the main proceedings can be included in an installation covered by the ETS only if, first of all, their activity is associated directly with an activity listed in Annex I carried out in the installation and that direct association is evidenced by the existence of a technical connection which is such that the connection between the activities concerned contributes to the integrity of the overall technical process of the activity covered by Annex I to that directive (see, to that effect, judgment of 29 April 2021, *Granarolo*, C-617/19, EU:C:2021:338, paragraphs 42 and 45).
- 51 Next, in so far as those criteria are met, it should be noted, as regards the third criterion relating to the fact that the activity concerned must be capable of having an effect on emissions and pollution, that, by virtue of Article 2(1) of Directive 2003/87, which defines the latter’s scope, the directive is to apply to ‘emissions’ of greenhouse gases – which are listed in Annex II thereto and include CO₂ – ‘from the activities listed in Annex I’ to that directive (judgment of 20 June 2019, *ExxonMobil Production Deutschland*, C-682/17, EU:C:2019:518, paragraph 47 and the case-law cited).

- 52 Thus, the Court has held that the activities referred to in Annex I fall within the scope of that directive and, therefore, of the ETS only if they generate greenhouse gas ‘emissions’ listed in Annex II (judgment of 28 February 2018, *Trinseo Deutschland*, C-577/16, EU:C:2018:127, paragraph 45).
- 53 In that regard, it must be noted that, admittedly, by providing that activities which are directly associated with an activity listed in Annex I to Directive 2003/87 carried out in an installation may be included in that installation, the EU legislature has provided that activities which do not meet the conditions defining the scope of that directive and, in particular, do not appear in Annex I may come within the ETS (see, to that effect, judgment of 9 June 2016, *Elektricitets Produktiemaatschappij Zuid-Nederland EPZ*, C-158/15, EU:C:2016:422, paragraphs 28 and 29).
- 54 It cannot, however, be inferred from this that the third criterion laid down in Article 3(e) of that directive is met in the case where the activity in question, while generating emissions and pollution, does not emit greenhouse gases listed in Annex II to that directive.
- 55 According to Article 3(b) of Directive 2003/87, ‘emissions’ are, for the purposes of that directive, defined as the release of greenhouse gases into the atmosphere from sources in an installation. It thus follows from the very wording of that provision that, for there to be an ‘emission’ within the meaning of that provision, a greenhouse gas must be released into the atmosphere (order of 6 February 2019, *Solvay Chemicals*, C-561/18, EU:C:2019:101, paragraph 25 and the case-law cited).
- 56 Consequently, it is in the light of that definition that the emissions and pollution referred to in Article 3(e) of that directive must be interpreted; these can therefore concern solely the greenhouse gases listed in Annex II to that directive.
- 57 It follows that the noise emissions resulting from the operation of the chillers at issue in the main proceedings do not meet the third criterion under Article 3(e) of Directive 2003/87, relating to effects on emissions and pollution. Therefore, it cannot be assumed that, for that reason, those chillers and EDW’s cogeneration plant may be regarded as forming one and the same installation for the purposes of applying the ETS.
- 58 Consequently, such chillers cannot be regarded as being included in the installation subject to the ETS solely because, as provided for in the national legislation at issue in the main proceedings, they are regarded as being within the boundaries of the installation on account of such noise emissions, for the purposes of the permit granted under separate national legislation relating to pollution.
- 59 It must be noted that that conclusion cannot be called into question by the argument of the German Government, according to which, in the light of the EU legislature’s intention to adopt, in Article 3(e) of Directive 2003/87, in essence, a definition of the concept of ‘installation’ under Directive 2003/87 that is the same as the one in force in the EU legislation concerning integrated pollution prevention and control, in particular Directives 96/61 and 2010/75, it is permissible, for the purpose of applying the ETS, to adopt the same approach in determining the boundaries of the installation concerned as the one already established under the national legislation implementing those latter directives.

- 60 First, it must be held that Article 8 of Directive 2003/87 does indeed provide that Member States are to take the necessary measures to ensure that, where installations carry out activities listed in Annex I to Directive 96/61, replaced, most recently, by Directive 2010/75, the conditions of, and procedure for, the issue of a greenhouse gas emissions permit are coordinated with those for the permit provided for in Directive 96/61.
- 61 However, that procedural provision cannot alter the substantive conditions governing the application of the ETS, in particular as regards determining which installations are covered by it.
- 62 Second, it must be noted in this regard that, by providing, in Article 2(2) and (5) respectively, of Directive 96/61, and in Article 3(2) and (4) of Directive 2010/75, that the concept of ‘pollution’ is to mean the direct or indirect introduction, as a result of human activity, of substances, vibrations, heat or noise into the air, water or land which may be harmful to human health or the quality of the environment, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment, and that the concept of ‘emission’ is defined as the direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into air, water or land, those directives are based on an approach to those concepts that is broader than the one adopted under Directive 2003/87.
- 63 Accordingly, acceptance of the German Government’s argument set out in paragraph 59 of the present judgment would have the effect of depriving the scope of the ETS of its practical effect – in the present case in so far as it relates to greenhouse gas emissions – as laid down by the EU legislature and, therefore, as the Advocate General noted in point 49 of his Opinion, of disregarding the different objectives which the EU legislature sought to pursue under, on the one hand, Directive 2003/87 and, on the other, Directives 96/61 and 2010/75.
- 64 That being so, it must be noted that, subject to that limitation to emissions and pollution related to the greenhouse gases listed in Annex II to Directive 2003/87, it is clear from the wording of Article 3(e) of that directive that it is not necessary to interpret strictly the conditions under which the third criterion referred to in that article may be regarded as met.
- 65 First, that provision does not require that the activities concerned should emit greenhouse gases themselves, but merely requires an effect in that regard. Second, in so far as the activity need only be capable of having such an effect, that criterion does not require that an actual effect on emissions and pollution actually be determined, but solely that the potential for such an effect can be established.
- 66 It follows that, in so far as the other criteria laid down in Article 3(e) of Directive 2003/87 are met, an activity which could influence the level of greenhouse gas emissions of an activity coming within Annex I to that directive may be included within the boundaries of the same installation as the latter activity.
- 67 Such an interpretation is also borne out by the objectives pursued by the ETS. In that regard, it should be recalled that Directive 2003/87 has the purpose of establishing an emission allowance trading scheme which seeks to reduce greenhouse gas emissions into the atmosphere to a level that prevents dangerous anthropogenic interference with the climate system and the ultimate objective of which is protection of the environment (judgment of 3 December 2020, *Ingedion Germany*, C-320/19, EU:C:2020:983, paragraph 38 and the case-law cited).

- 68 There is an economic logic underlying the scheme that encourages a participant in the scheme to emit quantities of greenhouse gases that are less than the allowances originally allocated to it, in order to sell the surplus to another participant which has emitted more than its allowance (judgment of 3 December 2020, *Ingredion Germany*, C-320/19, EU:C:2020:983, paragraph 39 and the case-law cited).
- 69 In the context of the attainment of those objectives, it must be observed that, as is apparent from recital 20 and Article 10a(1) of Directive 2003/87, that directive is intended to encourage the reduction of greenhouse gas emissions and to improve energy efficiency by taking account of the most efficient techniques (see, to that effect, judgments of 18 January 2018, *INEOS*, C-58/17, EU:C:2018:19, paragraph 43 and the case-law cited; of 12 April 2018, *PPC Power*, C-302/17, EU:C:2018:245, paragraph 27; and of 21 June 2018, *Poland v Parliament and Council*, C-5/16, EU:C:2018:483, paragraph 61).
- 70 In circumstances where the level at which an operator carries on an activity listed in Annex I to that directive, and, accordingly, the level of the resulting greenhouse gas emissions, depend on an activity that is not covered by that annex which, in accordance with the other criteria in Article 3(e) of that directive, set out in paragraph 50 of the present judgment, is associated directly with the former activity and is, on account of a technical connection, integrated into its overall technical process, it cannot be ruled out that, even though the activity that does not come within that annex does not generate greenhouse gases itself, a participant in the ETS might be encouraged to improve its efficiency with a view to reducing its needs linked to the activity covered by that Annex I and, consequently, the emissions resulting from that latter activity.
- 71 In the present case, it is apparent from the information available to the Court that a part of the heat production in EDW's industrial cogeneration plant is carried out in order to meet the needs of its chillers, with the result that those needs determine the degree of activity of that plant and, therefore, the resulting level of greenhouse gas emissions.
- 72 As the Advocate General observed in point 65 of his Opinion, it is therefore possible to take the view that the chillers could have an effect on emissions and pollution and that, therefore, provided that the other criteria laid down in Article 3(e) of Directive 2003/87 are met, those chillers and EDW's thermal plant form one and the same installation, this being a matter, as the case may be, for the referring court to ascertain.
- 73 In the light of the foregoing considerations, the answer to the first question is that Article 2(1) and Article 3(e) of Directive 2003/87 must be interpreted as not precluding national legislation which permits the inclusion, within the boundaries of an installation subject to the ETS, of ancillary units which do not emit greenhouse gases, provided that they meet the criteria set out in Article 3(e) of that directive and, in particular, that they could have an effect on emissions and pollution relating to the greenhouse gases listed in Annex II to that directive.

The second question

- 74 By its second question, the referring court asks, in essence, whether the corrected eligibility ratio referred to in the Data Collection Template drawn up by the Commission pursuant to Article 7(5) of Decision 2011/278 constitutes, even where the measurable heat imported from an installation not subject to the ETS can be attributed to a particular heat flow, a single ratio that must, for the

purpose, in particular, of calculating the number of emission allowances allocated free of charge to a heat benchmark sub-installation, be calculated and applied on the basis of a comprehensive approach to the heat flows for that sub-installation.

- 75 In particular, that court wishes to know whether, provided that the chillers at issue in the main proceedings are included within the boundaries of the installation, it is appropriate to adopt such a comprehensive approach, even though the import of heat in the form of 11 °C or 17 °C water from Global Foundries may be attributed to the heat flow relating to the 32 °C warm water produced by the chillers of the cogeneration plant.
- 76 As a preliminary point, it must be recalled that, in accordance with Article 10a(3) of Directive 2003/87, subject to, *inter alia*, paragraph 4 of that article, no free allocation is to be given to electricity generators, within the meaning of Article 3(u) of that directive. Under that paragraph 4, allowances are to be given free of charge to high-efficiency cogeneration, as defined by Directive 2004/8, for economically justifiable demand, in respect of the production of heating or cooling.
- 77 It is apparent from the information supplied by the referring court that EDW operates a high-performance industrial cogeneration plant, with the result that, subject to verification by the referring court, it is covered, in any event, by the provisions laid down in Article 10a(4) of Directive 2003/87.
- 78 With those preliminary observations having been made, it must be noted that Article 7(1) of Decision 2011/278 provides that, for each incumbent installation eligible for the free allocation of emission allowances under Article 10a of that directive, Member States are, for all years of the period from 1 January 2005 to 31 December 2008, or 1 January 2009 to 31 December 2010 where applicable, during which the installation has been operating, required to collect from the operator all relevant information and data regarding each parameter listed in Annex IV to that decision.
- 79 In addition, in accordance with the second subparagraph of Article 7(5), those Member States may require the operator to use an electronic template or specify a file format for submission of the data. However, Member States are required to accept an operator's use of any electronic template or file format specification published by the Commission for the purpose of data collection under that article, unless the Member State's template or file format specification requires at least input of the same data.
- 80 In the present case, it is apparent from the information available to the Court that the DEHSt has adopted the Data Collection Template published by the Commission, which refers to the corrected eligibility ratio in point (j) of Section II.2, which is entitled 'Complete balance of measurable heat at the installation', of Sheet E, in turn entitled "Energy Flows" – Data on Energy Input, Measurable Heat and Electricity'.
- 81 In order to answer the second question, it must be noted, first, that the first subparagraph of Article 6(1) of Decision 2011/278 provides that, for the purposes of that decision, Member States are to divide each installation eligible for the free allocation of emission allowances under Article 10a of Directive 2003/87 into one or more of the sub-installations referred to in that provision, as required, which include a heat benchmark sub-installation; the allocation of free emission allowances which is at issue in the dispute in the main proceedings concerns such a heat benchmark sub-installation.

- 82 In that regard, Article 3(c) of that decision defines the concept of ‘heat benchmark sub-installation’ as inputs, outputs and corresponding emissions not covered by a product benchmark sub-installation relating to the production, the import from an installation or other entity covered by the Union scheme, or both, of measurable heat which is consumed within the installation’s boundaries for the production of products, for the production of mechanical energy other than used for the production of electricity, for heating or cooling with the exception of the consumption for the production of electricity, or exported to an installation or other entity not covered by the Union scheme with the exception of the export for the production of electricity.
- 83 Furthermore, subject to verification by the referring court, the installation at issue in the main proceedings is an ‘incumbent installation’ within the meaning of Article 3(a) of Decision 2011/278, as it must be read in the light of Article 3(e) of Directive 2003/87.
- 84 On that basis, in accordance with Article 10(1) and Article 10(2)(b)(i) of that decision, the calculation of the preliminary annual number of emission allowances allocated free of charge to a sub-installation, carried out on the basis of the data collected in accordance with Article 7 of that decision, is equivalent to the value of the heat benchmark for measurable heat as referred to in Annex I multiplied by the heat-related historical activity level for the consumption of measurable heat.
- 85 Under Article 9(3) of that decision, that historical activity level is to refer, in principle, to the median annual historical import from an installation covered by the Union scheme, production, or both, during the baseline period, of measurable heat consumed within the installation’s boundaries for the production of products, for the production of mechanical energy other than used for the production of electricity, for heating or cooling with the exception of the consumption for the production of electricity, or exported to installations or other entities not covered by the Union scheme with the exception of the export for the production of electricity.
- 86 It must therefore be held that, under that provision, the free allocation of emission allowances is carried out, in accordance with the criteria forming the concept of ‘heat benchmark sub-installation’, within the meaning of Article 3(c) of Decision 2011/278, on the basis of a comprehensive, rather than separate, assessment of the heat flows for the installation concerned.
- 87 Second, in the light of the foregoing considerations, it must be observed that the Data Collection Template published by the Commission complies with the requirements laid down by that decision as regards the determination of the number of free emission allowances which the operator of a heat benchmark sub-installation may claim.
- 88 That Data Collection Template requires, first of all, in accordance with points (a) to (e) of Section II.2 of Sheet E, on the one hand, that the total amount of measurable heat available in the installation be calculated and, on the other, that the ratio of ‘ETS heat’ to total heat be determined, which corresponds to the ratio of the share of that measurable heat eligible for free allocation of emission allowances to the total amount of measurable heat available.
- 89 In accordance with that decision, account may be taken, for the purposes of that allocation, only of the measurable heat produced in the installation concerned and that imported from an installation covered by the ETS, excluding measurable heat imported from entities not covered by the ETS. In the present case, that ratio is determined in order to take account of the amount

of heat which is imported from Global Foundries and which cannot be taken into account for the purpose of calculating the emission allowances that are to be allocated free of charge, since Global Foundries is not subject to the ETS.

- 90 However, that ratio must be corrected since, depending on their intended use, some amounts of that measurable heat available must be excluded for the purpose of calculating the free allocation of emission allowances, in accordance with the provisions of Decision 2011/278. Thus, provision is made in points (f) to (h) of Section II.2 of Sheet E of the Data Collection Template for calculating the share of measurable heat consumed for electricity production within the installation, the share consumed for product benchmark sub-installations and the share exported to installations covered by the ETS.
- 91 It is also necessary to determine, where appropriate, to what extent measurable heat that is excluded by virtue of its intended use originates from a heat amount conferring entitlement to free allocation of emission allowances.
- 92 To that end, if this cannot be determined on the basis of an actual assessment of the heat flows, use must be made of the ratio of ‘ETS heat’ to total heat, calculated in point (e) of Section II.2 of Sheet E of the Data Collection Template, as provided for, inter alia, in point (f) of Section II.2, in relation to the share of measurable heat consumed for electricity production within the installation.
- 93 On the basis of the data calculated in points (f) to (h) of Section II.2, the corrected eligibility ratio referred to in point (j) of that section allows, by taking account of the amounts of measurable heat to be excluded according to their intended use, in accordance with point (i) of that Section II.2, for determination of the ratio of measurable heat eligible by virtue of its origin to the total amount of measurable heat available in the installation.
- 94 It follows that the corrected eligibility ratio is a single ratio calculated and applied on the basis of a comprehensive approach to the heat flows for a heat benchmark sub-installation.
- 95 As the Advocate General observed in point 82 of his Opinion, the Data Collection Template provides, in point (o) of Section II.2 of Sheet E, that, ultimately, in order to determine the amount of heat attributable to heat benchmark sub-installations, the corrected eligibility ratio is applied to the total amount of heat potentially part of the heat benchmark sub-installations, which corresponds to the total of the measurable heat consumed in the installation and eligible for free allocation and the measurable heat exported to installations or entities which are not covered by the ETS.
- 96 Such a conclusion cannot, contrary to what EDW claims, be called into question by ‘Guidance Document No 3 on the harmonised free allocation methodology for the EU-ETS post 2012 (Data Collection Guidance)’ of 14 April and 29 June 2011, accessible on the Commission’s website.
- 97 As is apparent from paragraphs 91 and 92 of the present judgment, one of the steps in the complete balance of measurable heat at the installation consists in determining to what extent the amounts of measurable heat which are excluded by virtue of their use originate from a heat amount conferring entitlement to free allocation of emission allowances. As part of that step, it is necessary to carry out an actual assessment of the heat flows or, where this is not possible, to implement the ratio of ‘ETS heat’ to total heat, calculated in point (e) of Section II.2 of Sheet E of the Data Collection Template.

- 98 It is in the light of that operation that it is necessary to understand the statement on page 46 of ‘Guidance Document No 3 on the harmonised free allocation methodology for the EU-ETS post 2012 (Data Collection Guidance)’, according to which that ratio is only needed in case it is not feasible to earmark clearly which shares of individual heat flows taken separately are produced within and outside the boundaries of installations subject to the ETS.
- 99 Therefore, that statement relates to the comprehensive approach to the heat flows for the heat benchmark sub-installation concerned and it cannot be inferred from it that it permits free allocation of emission allowances based on an isolated assessment of those various heat flows, which, moreover, would fail to comply with the requirements of Decision 2011/278, set out in paragraph 86 of the present judgment.
- 100 In the light of the foregoing considerations, the answer to the second question is that the corrected eligibility ratio referred to in the Data Collection Template drawn up by the Commission pursuant to Article 7(5) of Decision 2011/278 constitutes, even where the measurable heat imported from an installation not subject to the ETS can be attributed to a particular heat flow, a single ratio that must, for the purpose, in particular, of calculating the number of emission allowances allocated free of charge to a heat benchmark sub-installation, be calculated and applied on the basis of a comprehensive approach to the heat flows for that sub-installation.

The third question

- 101 By its third question, the referring court asks, in essence, whether the third subparagraph of Article 6(1) of Decision 2011/278 must be interpreted as meaning that a process of a heat benchmark sub-installation relates to a sector or subsector that is deemed to be exposed to a significant risk of carbon leakage where that process concerns heat consumed in order to produce cooling that is exported and consumed within an entity which is not subject to the ETS and which belongs to a sector or subsector that is deemed to be exposed to a significant risk of carbon leakage.
- 102 It must be borne in mind that, under Article 10a(11) of Directive 2003/87, the amount of allowances allocated free of charge for 2013, under paragraphs 4 to 7 of that article, was to be 80% of the quantity determined in accordance with the measures referred to in paragraph 1 of that article. Thereafter the free allocation was to decrease each year by equal amounts resulting in 30% free allocation in 2020, with a view to reaching no free allocation in 2027.
- 103 Article 10a(12) of that directive provided for an exception to that rule. Thus, for 2013 and each subsequent year up to 2020, installations in sectors or subsectors which were exposed to a significant risk of carbon leakage were to be allocated, pursuant to paragraph 1 of that article, allowances free of charge at 100% of the quantity determined in accordance with the measures referred to in paragraph 1 of that article.
- 104 Thus, the second subparagraph of Article 6(1) of Decision 2011/278 provides that, for, inter alia, heat benchmark sub-installations, Member States must distinguish clearly between whether or not the relevant process serves a sector or subsector deemed to be exposed to a significant risk of carbon leakage as determined by Decision 2010/2. In addition, in accordance with the third subparagraph of that provision, where an installation included in the ETS has produced and exported measurable heat to an installation or other entity not included in that ETS, Member States are to consider that the relevant process of the heat benchmark sub-installation for this

heat does not serve such a sector or subsector deemed to be exposed to a significant risk of carbon leakage unless the competent authority is satisfied that the consumer of the measurable heat belongs to such a sector or subsector.

- 105 It follows that, in any event, enjoyment of the provisions relating to sectors or subsectors exposed to a significant risk of carbon leakage requires that the exported measurable heat be consumed by an entity which belongs to a sector or subsector exposed to such a risk.
- 106 According to the definition of the concept of ‘heat benchmark sub-installation’, provided for in Article 3(c) of Decision 2011/278, the consumption of measurable heat used for cooling takes place within that sub-installation.
- 107 Thus, contrary to what EDW submits, and as the Advocate General observed in points 91 and 92 of his Opinion, it must be inferred from this that the consumption of cooling by an entity that belongs to a sector or subsector exposed to such a risk is not equivalent to heat consumption. That heat consumption takes place within the installation in which the cooling is produced in order to be exported to such an entity. Therefore, the process concerning heat consumed in that way cannot be regarded as relating to a sector or subsector exposed to a significant risk of carbon leakage, within the meaning of the third subparagraph of Article 6(1) of that decision.
- 108 In the present case, it must be held that it is within EDW’s chillers that the measurable heat necessary for the production of the cooling which is exported to Global Foundries’ factory is consumed, with the result that the provisions relating to sectors or subsectors exposed to a significant risk of carbon leakage cannot apply on account of such consumption.
- 109 Contrary to what EDW claims, the Commission document entitled ‘Frequently Asked Questions on Free Allocation Rules for the EU ETS post 2020’ is not capable of calling that conclusion into question. As the Advocate General observed in points 95 to 97 of his Opinion, in addition to the fact that that document has no binding force and that it concerns a trading period subsequent to that at issue in the main proceedings, it must be held that that document, by referring to Section 7.1 of Annex VII to Delegated Regulation 2019/331, must be interpreted as also adopting the view that the use of heat to produce cooling via an absorption cooling process, such as that taking place in EDW’s chillers, constitutes the heat consuming process.
- 110 In the light of the foregoing considerations, the answer to the third question is that the third subparagraph of Article 6(1) of Decision 2011/278 must be interpreted as meaning that a process of a heat benchmark sub-installation does not relate to a sector or subsector that is deemed to be exposed to a significant risk of carbon leakage where that process concerns heat consumed in order to produce cooling that is exported and consumed within an entity which is not subject to the ETS and which belongs to a sector or subsector that is deemed to be exposed to a significant risk of carbon leakage, since it is not that entity that is consuming the heat.

Costs

- 111 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. Article 2(1) and Article 3(e) of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009, must be interpreted as not precluding national legislation which permits the inclusion, within the boundaries of an installation subject to the greenhouse gas emission allowance trading scheme at EU level, of ancillary units which do not emit greenhouse gases, provided that they meet the criteria set out in Article 3(e) of that directive, as amended, and, in particular, that they could have an effect on emissions and pollution relating to the greenhouse gases listed in Annex II to that directive, as amended.
2. The corrected eligibility ratio referred to in the Data Collection Template drawn up by the European Commission pursuant to Article 7(5) of Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council constitutes, even where the measurable heat imported from an installation not subject to the greenhouse gas emission allowance trading scheme at EU level can be attributed to a particular heat flow, a single ratio that must, for the purpose, in particular, of calculating the number of emission allowances allocated free of charge to a heat benchmark sub-installation, be calculated and applied on the basis of a comprehensive approach to the heat flows for that sub-installation.
3. The third subparagraph of Article 6(1) of Decision 2011/278 must be interpreted as meaning that a process of a heat benchmark sub-installation does not relate to a sector or subsector that is deemed to be exposed to a significant risk of carbon leakage where that process concerns heat consumed in order to produce cooling that is exported and consumed within an entity which is not subject to the greenhouse gas emission allowance trading scheme at EU level and which belongs to a sector or subsector that is deemed to be exposed to a significant risk of carbon leakage, since it is not that entity that is consuming the heat.

[Signatures]